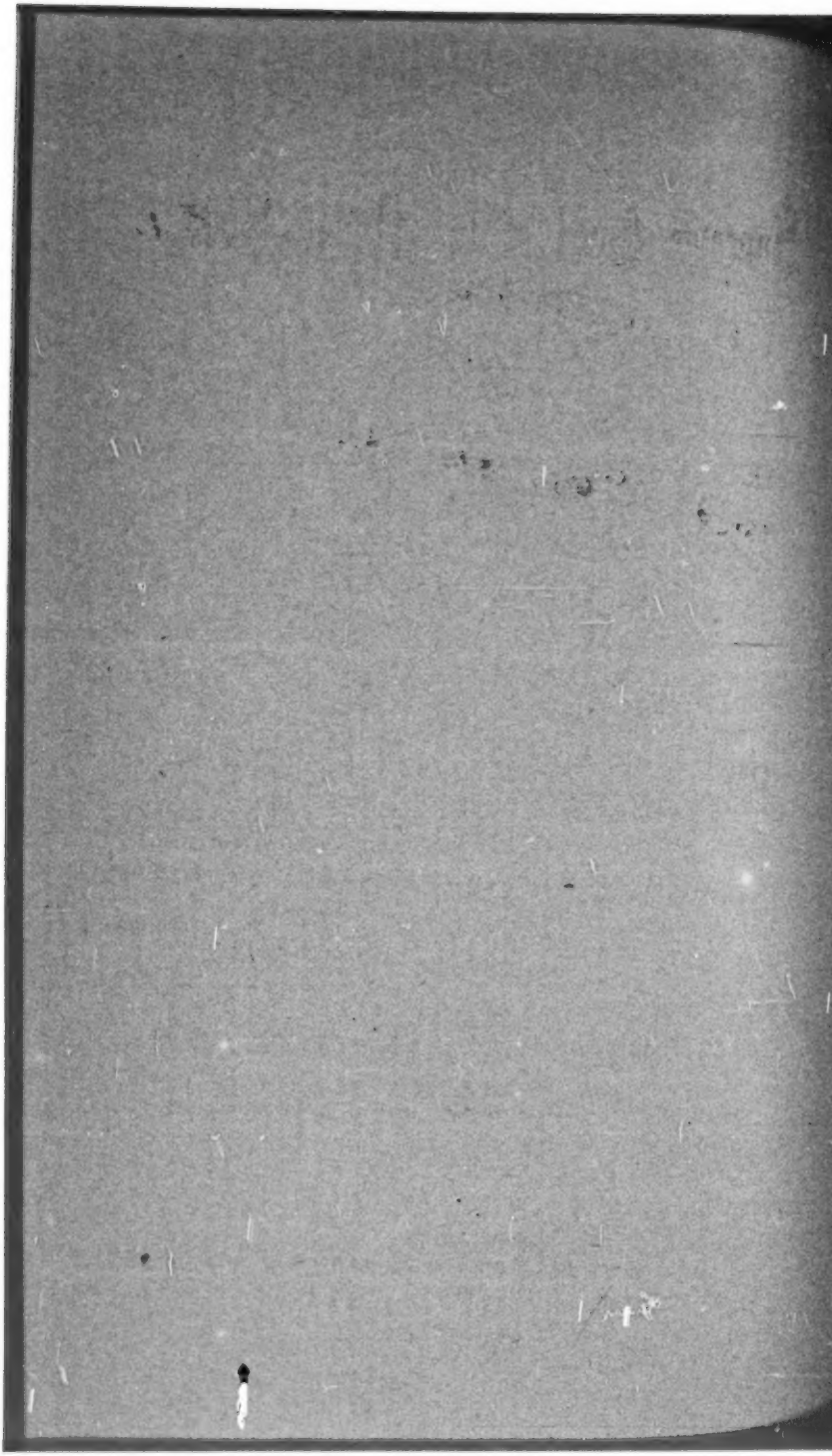


Office Supreme Court U.S.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

No. 243.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 8, 1901.

BARBARA CHAVEZ DE ARMIJO,
APPELLANT,
v.
JUSTO R. ARMIJO.
No. 243.

BRIEF OF APPELLANT.

J. H. McGOWAN,
Attorney for Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1901.

24961

Supreme Court of the United States.

OCTOBER TERM, 1900.

BARBARA CHAVEZ DE ARMIJO *v.* JUSTO ARMIJO.	*No.* 243.

STATEMENT AND BRIEF ON BEHALF OF APPELLANT.

The case is in this court on appeal from the Supreme Court of the Territory of New Mexico. It is in assumpsit, and was commenced in the District Court for the county of Bernalillo. The declaration is on the common counts, alleging damages in the sum of ten thousand dollars, filed February 13, 1897. The defendant (appellant here) plead the general issue with notice of set-off. A bill of items was filed with the declaration. Upon these pleadings the issue was joined. (Rec. 1, 2, 3, 4.)

On motion of the defendant the cause was referred to Wm. D. Lee, with the order that he "take the proofs of the plaintiff herein, and that said referee, to whom this cause is referred, report his findings of fact and conclusions of law in this cause with all possible speed." (Rec. 5, 6.)

Subsequently, and on the 18th day of August, 1898, the referee reported as follows:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO
v.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

REFEREE'S REPORT.

To the Honorable J. W. Crumpacker, Associate Justice of the Supreme Court of the Territory of New Mexico, and judge of said district court:

As referee in the above-entitled cause, I do respectfully report: That having heretofore been appointed referee in the above-entitled cause, I caused said parties, together with their repective counsel and witnesses, in pursuance of due notice given in accordance with the statute, to appear before me in my office in the city of Albuquerque, on the 5th day of May, 1898, and on a number of days thereafter, for the purpose of submitting their respective proofs in the above-entitled cause. That a large amount of typewritten testimony was taken before me, comprising one hundred and sixty-one pages of such typewritten testimony, and a large number of exhibits were introduced in evidence, and filed with me as referee, all of which testimony and exhibits are returned herewith as a part of my report.

Said case is an action in assumpsit on the common counts, wherein the plaintiff demands ten thousand dollars damages.

The defendant pleads non-assumpsit and a set-off for fourteen thousand dollars also on the common counts against the plaintiff.

The issues being thus formed, it would appear the controversy would be simply the correct balance between them, but the first question that arose was as to the existence of

a contract claimed to have been entered into between the parties on the 20th day of June, 1892, by which the defendant had employed the plaintiff to work for her at an annual salary of $2,500 per year, which alleged contract was claimed to have been in writing, but had been lost. The existence of this contract was most emphatically denied by defendant, thus raising an issue of fact, the existence of which extended through many days, making a record of many pages of typewriting.

Plaintiff introduced what he claimed to be a copy of the contract, which reads as follows:

"Copy, April 25, 1898."

ALBUQUERQUE, N. MEX., *June* 25, 1892.

This agreement made on the date above written between us is: That from the first day of January, 1892, J. R. Armijo shall be paid for his services at the rate of ($2,500.00) two thousand five hundred dollars per year.

J. R. ARMIJO.

MRS. N. T. ARMIJO.

(The above is a certified translation made by the court stenographer.)

If this contract should be admitted in evidence it would prove but one uncontroverted question in the case, and that is as to the amount of plaintiff's compensation. The fact that plaintiff performed the services as set forth in the declaration is not denied, nor is the testimony of plaintiff as to the value of his services disputed by any other evidence in the case. Mr. Dickmann was asked as to the value of the services for collecting the rents for the N. T. Armijo building, which he said were five per cent., but does not pretend to say what the services of plaintiff were or the value thereof. The defendant herself does not claim

to know, but testifies most positively that she does not know. On page 59 of the record, in answer to a question, she gives an unequivocal answer as follows :

Q. Mrs. Armijo, do you know what the services of J. R. Armijo were reasonably worth in acting for you as your agent during the period he was so engaged up to December 31, 1896, for each year ?

A. I don't know what the services were worth; they must have been like the services of all managers.

Q. Do you know, Mrs. Armijo, what services were performed by J. R. Armijo for you during these years, before December 31, 1896 ?

A. He collected my rents, attended to all my business, taxes and all, collect the rents, pay the taxes every year, and pay my accounts every year.

Q. Do you know how much of his time was occupied to do that ?

A. I do not.

The testimony of defendant shows that the employment of plaintiff was not confined to collecting rents of the Armijo building, while the testimony of plaintiff is to the effect that the entire charge and management of the whole estate was the services rendered.

There being no testimony offered on the part of the defendant in any way controverting the value plaintiff sets upon his services, the admission of the contract becomes immaterial, and it would have no effect on the result of the case. Plaintiff testifies that his services were worth twenty-five hundred dollars per annum, the same amount as which was claimed to be fixed in the alleged agreement, and as there is no testimony controverting this value, the referee will have to take this amount as correct in summing up the case.

There is no dispute as to the period of services rendered by plaintiff for defendant, being five years, nor is there any question or dispute as to the amount of money claimed by plaintiff to have been advanced by him for the use of defendant, this amount being $3,717.65.

The defendant introduces under her set-off a note given by plaintiff for the sum of $6,000, made July 11, 1892, with interest at four per cent. per annum; also a check for $3,824.48 cash that plaintiff received from defendant about the date of his employment, and which defendant testifies and claims was paid plaintiff as an advance for services to be rendered in the future. There is no evidence on the part of plaintiff disputing the first of these items. He admits giving the note, and says in his testimony that it was for borrowed money. As to the second item there is not sufficient proof to establish it as a gift from defendant to plaintiff, as claimed by him; referee therefore finds that said plaintiff is properly chargeable with the amount of said item.

A statement of the account between them, as shown by the evidence, is as follows:

Amount claimed by Mrs. N. T. Armijo to have been paid to J. R. Armijo for future services	$3,824.48
Less salary for J. R. Armijo for year 1892 ...	2,500.00
Jan. 1, 1893. Balance due Mrs. N. T. Armijo on money advanced	1,324.48
Jan. 1, 1894. Note of J. R. Armijo to Mrs. N. T. Armijo, dated July 11, 1892	6,000.00
Jan. 1, 1894. Interest on above note from July 11, 1892, to January 1, 1894, at 4 per	

cent., one year, five months and twenty days	$353.33
Jan. 1, 1894. Amount due Mrs. Armijo	7,677.81
Less salary for J. R. Armijo for 1893	2,500.00
Amount due Mrs. Armijo Jan. 1, 1894.	5,177.81
Jan. 1, 1895. Interest at 4 per cent. 1 year	207.11
Jan. 1, 1895. Amount due Mrs. Armijo	5,384.92
Less salary for J. R. Armijo for 1894	2,500.00
Amount due Mrs. Armijo Jan. 1, 1895.	2,884.92
Jan. 1, 1896. Interest at 4 per cent. 1 year	115.39
Jan. 1, 1896. Amount due Mrs. Armijo	3,000.31
Less salary J. R. Armijo for 1895	2,500.00
Amount due Mrs. Armijo Jan. 1, 1896.	500.31
April 1, 1896. Three months' interest at 4 per cent	5.00
	505.31
April 1, 1896. Salary J. R. Armijo three months	625.00
Balance due J. R. Armijo, April 1, 1896	119.69
Dec. 31, 1896. Salary due J. R. Armijo, from April 1, 1896, to December 31, 1896, 9 months	1,875.00
Balance due J. R. Armijo Jan. 1, 1897, on account of salary	1,994.69

Amount advanced by J. R. Armijo for Mrs. Armijo.....	$3,717.65
Total amount due J. R. Armijo Jan. 1, 1897	5,712.34
Amount due J. R. Armijo July 1, 1897, being six months from the date when Mr. Armijo severed his connection with the business of Mrs. Armijo, and being 6 months from the date of the last item in said account	5,712.34
Interest from July 1, 1897, to August 15, 1898, 1 year, one month and 15 days at 6 per cent	385.58
	$6,097.92

In a running account such as this, where money is advanced by both sides, and one party is in the employment of the other, no interest should be allowed on balances unless expressly agreed to, and can only be allowed six months from the date of the last item. In summing up the account, I find that there was due J. R. Armijo a balance of $5,712.34 on January 1st, 1897, and with interest six months from that date up to the present time, or date of this report, at six per cent., being one year, one month and fifteen days, amounts to $385.58. I therefore find that there is a balance due J. R. Armijo from Barbara Chavez de Armijo, on the 15th day of August, 1898, of $6,097.92, and I respectfully recommend that a judgment be entered in favor of J. R. Armijo for that amount, together with costs.

In compliance with the statutes I certify that testimony or proofs were introduced before me for nine full days, and

I have been occupied six days in examining the books, exhibits and testimony and authorities in this cause, which are very voluminous, and in getting up my report as referee.

All of which is respectfully submitted,

WM. D. LEE, *Referee.*

Record 6, 7, 8, 9.

With this report and as a part of it the referee filed the testimony taken before him. This testimony is embraced in the printed record from page 11 to page 110. The defendant duly filed exceptions to the report on the grounds:

First. For that the said referee erroneously reported that there was due to the said plaintiff from the said defendant on August 15, 1898, a balance of $6,097.92; whereas the said refereee should have reported a balance of a large amount due from the plaintiff to the defendant on said account.

Second. For that the said referee erroneously admitted in evidence secondary proof of the contents of the alleged contract between said parties to have been copied from page 988 of the letter-press copybook, marked Exhibit 1, for identification over defendant's objection.

Third. For that the said referee erroneously admitted the paper-writing, Plaintiff's Exhibit 2, for identification over defendant's objection.

Fourth. For that the said referee erroneously overruled the objections of the defendant to the admission and rejection of evidence upon the hearing, which objections appear noted in the report of the said referee, and each one of which objections and exceptions is hereby referred to and made a part hereof as fully as if the same were incorporated herein.

Fifth. For that the findings of fact by said referee are

against the evidence in said cause taken and reported by said referee.

Sixth. And for that the conclusions of law by said referee are insufficient and erroneous.

Seventh. For other errors prejudicial to the defendant and apparent upon the record and of said report.

Wherefore the defendant prays the court that the said report be set aside, and that the said cause be again referred with proper instructions to the referee.

WARREN & FERGUSSON,
Attorneys for Defendant.

Rec. 111.

Subsequently, on September 15, 1898, the court rendered judgment as follows:

It is considered, ordered, and adjudged by the court that the said exceptions be and each of the same hereby is overruled and denied, and that the report of the said referee be and the same hereby is in all things approved and confirmed.

It is further considered, ordered, and adjudged by the court that the findings of the said referee herein be and the same are hereby adopted as the findings of this court, and in pursuance thereof and in accordance therewith it is considered, ordered, and adjudged by the court that the plaintiff, Justo R. Armijo, do have and recover of and from the defendant, Barbara Chavez de Armijo, the sum of six thousand and ninety-seven dollars and ninety-two cents ($6,097.92) with interest thereon at the rate of six per cent. per annum from the 15th day of August, 1899, until paid, together with his costs in this behalf expended to be taxed, including the sum of one hundred and fifty dollars ($150), which is hereby allowed to the said referee for his compen-

sation in the said cause and the sum of sixty-nine and 75-100 dollars ($69.75), which is hereby allowed for the services of the stenographer employed by the referee by consent of the parties in taking down and transcribing the testimony before the referee herein, not including the extra copies of the said testimony furnished by the stenographer to the respective parties in the cause, and that he have execution therefor.

And thereupon the defendant, by her attorney, gives notice of an appeal to the Supreme Court of the Territory of New Mexico.

(Signed) J. W. CRUMPACKER,
Judge.

Rec. 112.

Thereupon, and in due time, the defendant filed an appeal bond, to act as a supersedeas, which bond recited, among other things, that "*the above bounden Barbara Chavez de Armijo, defendant in said action, has prayed an appeal from said judgment to the Supreme Court of the Territory of New Mexico.*"

This bond was duly approved by the judge as follows: "Approved by me this 3d day of October, 1898. J. W. Crumpacker, Judge."

From some cause, not disclosed in the record, no formal order allowing the appeal was entered on the records of the court. On July 13, 1899, the defendant moved the court to direct the clerk to enter an order *nunc pro tunc* as of October 4, 1898. This motion is found on page 114 of the record here, and reads as follows:

"The defendant moves the court for an order directing the clerk of this court to enter an order granting an appeal from the final judgment herein, as of date of October 4, 1898."

"And for ground of this motion, states that on said date an appeal was taken by the said defendant, and allowed by the court to the Supreme Court of this territory; and the appeal bond of said defendant was approved and filed on said date; and the taking of said appeal does not sufficiently appear upon the record or minutes of the court." (Rec. 114.)

The court, by an order, overruled and denied this motion, without giving any reason therefor. To this order the defendant made due exception. (Rec. 115.) However, on the 20th day of October, 1899, the attorneys for the defendant filed a *præcipie* with the clerk of the district court, directing him to make up a transcript of the case to be used on appeal, and the case seems to have been sent to the Supreme Court and duly docketed there as an appeal from the Second Judicial District Court of the Territory. (Rec. 116.)

The defendant also, on September 15, 1899, sued out a writ of error to the said district court and presented a bill of exceptions, which the court refused to sign and settle, and to which refusal the defendant excepted. (Rec. 115, 116, 117.)

After the case reached the Territorial Supreme Court and was docketed on the appeal as cause No. 847, and on the writ of error as cause No. 840, the defendant filed in that court the following assignment of errors:

1. The court erred in overruling the defendant's objections to the report of the referee, and motion to set the same aside upon the grounds specified herein. (Transcript of Record, pp. 185, 186.)

2. The court and referee erred in admitting in evidence secondary evidence of the contents of the alleged copy of contracts between the parties of which Complainant's Exhibit 2 is a copy. (Record, p. 26, *et seq.*)

3. The court and referee erred in admitting evidence of

the alleged services of plaintiff below. (Record, p. 37, *et seq.*)

4. The court and referee erred in overruling the objections of the defendant below to evidence offered on the part of the plaintiff below. (See pp. 47, 91, 117, 135, 170, *et seq.* Transcript of Record.)

5. The court and referee erred in excluding competent evidence offered by defendant below. (See p. 113, *et seq.*, Transcript of Record.)

6. The findings of fact by the referee, approved by the court below, are against the evidence.

7. The conclusions of law found by the referee and approved by court are insufficient and erroneous.

8. The court erred in overruling the motion of plaintiff in error, the defendant below, for entry of an order granting an appeal herein. (Transcript, p. 192.)

9. Other errors apparent upon the face of the record.

WARREN & CHAVEZ,
Attorneys for Plaintiff in Error.

Rec. 117, 118.

Thereafter the attorney for the appellee and defendant in error, in the said cause so pending in the Supreme Court of the Territory, moved the court to affirm the judgment which had been rendered below. The motion and alleged reasons being as follows:

TERRITORY OF NEW MEXICO.

In the Supreme Court, January Term, A. D. 1900.

BARBARA CHAVEZ DE ARMIJO, Appellant,
v.
JUSTO R. ARMIJO, Appellee. } No. 847.

BARBARA CHAVEZ DE ARMIJO, Plaintiff in Error,
v.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Motion to Affirm Judgment.

Comes now Justo R. Armijo, appellee and defendant in error in the above-entitled cause, by Neill B. Field, his attorney, and moves the court to strike from the transcript filed in each of said causes so much and such part thereof as purport to set forth the evidence adduced on the hearing of the cause sought to be reviewed, and to affirm the judgment of the court below, and to enter judgment in this court against the appellant and the sureties on her supersedeas bond in cause No. 847, for the amount of said judgment and interest, and for ten per cent. damages, for the following reasons:

I.

Because no question of law is properly reserved for determination by this court upon the record as made up.

II.

Because no motion for new trial was filed in the court below within ten days after the rendition of the judgment sought to be reviewed, as required by law.

III.

Because what purports to be the oral testimony taken before the referee in said cause is not authenticated as required by law, and is therefore no part of the record.

IV.

Because *if* affirmatively appears from the transcript that the documentary evidence used before the referee was omitted from the transcript by direction of the attorneys for plaintiff in error and appellant, and the sufficiency of the evidence to support the findings and judgment cannot be reviewed, if what purports to be the oral evidence were properly authenticated.

V.

Because the so-called assignment of errors is insufficient and does not require an examination of alleged errors at the hands of the court.

VI.

Because the so-called brief of appellant and plaintiff in error is in no sense a brief, but amounts to a mere evasion of the rules of the court requiring briefs to be filed.

VII.

Because the appeal and writ of error have operated to stay proceedings on the judgment of the district court, and appear to have been taken and sued out merely for delay.

NEILL B. FIELD,

Attorney for Appellee and Plaintiff in Error.

Rec. 119, 120.

The case being entitled as Nos. 840–7, was heard on this motion, and the judgment below affirmed on the sole ground that no motion for a new trial was filed in the case in the district court. (Rec. 121.)

The plaintiff in error and appellant, asked for a rehearing on these grounds:

1. In sustaining the respective motions of defendant in error and appellee to affirm the judgment below, this court overlooked the following error duly assigned them:

(8). The court erred in overruling the motion of appellant and plaintiff in error for entry of an order granting an appeal herein. (Transcript, p. 192.)

The supersedeas appeal bond approved and signed by his honor, the judge of the district court below, on October 4, 1892, expressly recites the appeal prayed by said defendant, Barbara Chavez de Armijo, from the judgment below to this court (p. 188), and this court overruled the recital of said fact in sustaining the motion of defendant in error upon said ground.

2. This court, in affirming the judgment below, overlooked the fact, shown by the record herein, that in the district court below due written objections and exceptions were filed in due time by the defendant below and argued and submitted to said district court, and that, therefore, under the rules and practice in such cases provided, a motion for a new trial was not required or necessary, and such motion upon said facts would have been a reflection upon the court below.

3. This court overlooked the assignment of errors, No. 3, as follows: "The court and referee erred in admitting evidence of value of the alleged services of plaintiff below." (Record, p. 37.)

The record distinctly shows that plaintiff below, himself, testified that his services were rendered under a written

agreement between the parties (p. 36, Record), and that said agreement had been written and signed upon p. 988 of the letter-press copy-book offered in evidence (Record, p. 47), and that said page containing such alleged written agreement had been removed from said book and was lost.

Upon the facts testified to by plaintiff, we submit that while evidence of the contents of the lost paper might have been admissible in evidence, it was clearly an error decisive of this cause to permit a recovery upon testimony of plaintiff to the value of such alleged services upon a *quantum meruit* as reported by the referee and entered by the court. (Rec. 122.)

The court overruled this motion for a rehearing, and thereupon the plaintiff in error and appellant sued out an appeal to this court, and asked the Supreme Court of the Territory to make findings of facts in the case as required by act of Congress.

The court allowed the appeal, but refused to make findings onthe ground that "the appeal not having been perfected in such manner as to bring the facts of the case into this court." (Rec. 123, 125.)

With the appeal was filed in the Supreme Court and made a part of the record the following

Assignment of Errors.

The said Supreme Court of the Territory of New Mexico erred in the following particulars:

1. The court erred in dismissing the appeal and writ of error of the appellant herein from the District Court of the Second Judicial District of said Territory, on motion of the appellee, without hearing this cause on the merits.

2. The court erred in dismissing said appeal and writ of error on the motion of appellee, and affirming the judgment

of the said district court for the reasons set out in said motion.

3. The court erred in dismissing said appeal and writ of error, and affirming the judgment of the said district court for the reasons set forth by the court in its said action and decision.

4. The court erred in dismissing said appeal and writ of error, and affirming the judgment of said district court for the reason that the transcript of record showed that a motion for a new trial had not been filed in said district court.

5. The court erred in refusing to make findings of fact on which it had based its action in dismissing said appeal and writ of error.

6. The court erred in inspecting the transcript of the record in this cause for the purpose of ascertaining that a motion for a new trial had not been filed in said cause, and at the same time refusing to inspect said transcript to consider and adjudge the whole case on its merits.

Wherefore this appellant humbly prays this honorable court that the actic and decision of said Supreme Court of the Territory of New Mexico may be reversed and this cause remanded, with such instructions as may be meet and proper.

H. L. WARREN,
Attorney for Appellant.

Rec. 127.

ARGUMENT.

A discussion of the 4th and 5th assignments of errors will probably sufficiently cover the whole contention which we wish to make in this court.

We shall take these up in the inverse order. The 5th

assignment is that the court erred in refusing to make findings of fact.

The proviso to section 2 of the act of April 7, 1874 (18 Stat. 27), makes it the duty of the territorial court, on appeals to this court, to make and certify a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to.

The Supreme Court refused to obey the requirements of this act on the sole ground that the appeal had not been perfected in such manner as to bring the facts of the case from the district court into that court. If the case was properly before the Supreme Court, either on the appeal or by reason of the writ of error, then this refusal was such error as to require the case to be remanded with instructions.

Was the case properly in the Supreme Court of the Territory on appeal?

On page 112 of the record is found the judgment of the district court duly signed by the judge. The last paragraph reads: *And thereupon the defendant, by her attorney, gives notice of an appeal to the Supreme Court of the Territory of New Mexico.*

This evidently was done during the term, and in open court. The record does not show that any citation was issued upon the prayer for appeal. But none was necessary. In Reily *v.* Lamar, 2 Cranch 349, L. ed., 2, 302, a case where there had been no citation on appeal, Chief Justice Marshal stated it "to be the opinion of the court, that the appeal having been prayed, pending the court below, a citation is not necessary, and, therefore, the case is properly before the court."

The latter case, on this point, is cited and approved in Hewitt *v.* Filbert (opinion by Chief Justice Waite), 116

U. S. 142, L. ed., 29–581. Also in Brown *v.* McConnell, 124 U. S. 489, L. ed., 31–495, the court says: "If an appeal is taken by the action of the court in session before the end of the term at which the decree is rendered, no formal citation is necessary, because both parties being constructively in court during the entire term they are charged by law with notice of all that is done in the case affecting their interests."

It is true that the district court in its judgment only states that the defendant gave notice of an appeal, and there is no entry on the records of the court of an allowance of the appeal. But the record of the case (112, 113) shows that eighteen days after the judgment was rendered and the notice of appeal given the judge, at chambers, approved an appeal bond presented by the defendant, which recited the judgment and the prayer for appeal, and was conditioned "that if the said appellant, Barbara Chavez De Armijo, shall prosecute her said appeal from said judgment with due diligence in said Supreme Court, and if said judgment appealed from shall be affirmed, or if her said appeal shall be dismissed, said appellant shall pay the judgment so rendered against her in said cause, and all costs that may be adjudged against her in the said Supreme Court in said appeal, then the above obligation shall be void, but otherwise the same shall remain in full force and effect."

This bond was approved by the judge who rendered the judgment in the following words: "Approved by me this 3d day of October, 1898. J. W. Crumpacker, judge." (Rec. 114.) It was filed in the court the next day.

In Sage *v.* R.R. Co., 96 U. S. 712, L. ed. 24–643, this court, in determining a somewhat similar question, the opinion being rendered by Chief Justice Waite, used the folowing language:

"The statute makes no provision in terms for the form of allowance of an appeal (R. S., Sec. 692); but as there can be no appeal without the taking of security, either for costs or costs and damages, and this is to be done by the court or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is in legal effect the allowance of an appeal. If the security is given and accepted in open court during the term at which the decree appealed from is rendered no citation is necessary, because the parties being presumptively present during the whole term are charged with notice of all that is done affecting their interests. Whenever, therefore, security for an appeal is accepted during the term an appeal is allowed. If the security is taken out of court, and after the term a citation should be issued to bring in the parties *unless they voluntarily appear*, for until the security has been accepted the allowance of an appeal cannot be said to have been perfected."

In further discussing this question in the opinion, and in allusion to the necessity of a citation, the court says: "No question in respect to a citation arises, because the appellees have appeared."

In a later case, that of Brandies *v.* Cochrane, 105 U. S. 262, L. ed. 26–989, the court, referring to Sage *v.* R.R. Co., declares that "the circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary." In this case the court also quotes Draper *v.* Davis, 102 U. S. 370, L. ed. 26–121, where it was held, in a case coming from the Supreme Court of the District of Columbia, that the power of a justice of the court below over the appeal to this court and over the security in the absence of fraud is exhausted when he takes the security and signs the citation, declaring that from that time the control of the supersedeas, as well as the appeal, is transferred to this court.

Now, in the case at bar, the defendant gave notice of an

appeal in open court, perfected her appeal bond, apparently in good time, and filed it, with the judge's approval on it. It seems clear from the judge's deliberate action in approving the bond, with its recitations and conditions, that he considered the notice of appeal set out at the foot of the judgment as equivalent to a prayer and allowance. On this point see U. S. *v.* Adams, 73 U. S. 101, L. ed. 18–792.

No complaint has been made by the appellee of the absence of a citation. The Supreme Court of the Territory places its judgment, affirming the decision of the district court, upon the sole ground that the defendant below made no motion in the District Court for a new trial. (Rec. 121.)

But it puts its refusal to find the facts upon the ground that the appeal was not perfected in such a manner as to bring the facts of the case into that court.

If the proceedings to secure an appeal, which were taken in open court, and the approval of the appeal bond were sufficient to perfect the appeal, then the facts of the case were properly in the appellate court.

The point of attack seems to be that the testimony taken before the referee was no part of his report, and hence no part of the record of the district court, and therefore was not legally brought into the Supreme Court. The provision of Sub-section 152, of the Code of Civil Procedure of New Mexico, as quoted by the attorney for the appellee in his motion to dismiss this case, directs that all testimony before a referee "shall be reduced to writing;" and Sub-section 153 reads as follows:

Sub-Sec. 153. Referees shall in all cases report as speedily as possible, reciting the order of the court, the notice to the parties, the time and place of stating the account or taking the testimony and all other proceedings had, and return the same, together with the testimony taken, to the court.

Now, when the referee in this case made his report he stated, "that a large amount of typewritten testimony was taken before me comprising 161 pages of such typewritten testimony, and a large number of exhibits were introduced in evidence, and filed with me as referee, *all of which testimony and exhibits are returned herewith as a part of my report.*"

Again, in Sub-section 172, the code enlarging the common law rule as to what should constitute a judgment roll, provides that in all cases tried before the court, either with or without a jury, the testimony and rulings shall be taken down by the court stenographer, and "when such notes are transcribed and the correctness of the same is certified to by the court stenographer, *the same shall come and be a part of the record in such action.* In all actions, the testimony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action, shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme Court of the Territory upon appeal or writ of error, and it shall not be necessary to prepare or have settled, signed or sealed, any bill of exceptions, in order to make any such matters a part of the record in such action."

This sub-section, after providing further, how errors in the stenographer's transcribed notes shall be corrected, then proceeds: "If for any reason it shall be impracticable to make the testimony, taken upon any trial, a part of the record in the manner above provided, it may be made a part of said record upon a bill of exceptions, as heretofore provided by law."

Undoubtedly, in this case, and without these statutes, when the referee's report came in, embracing the testimony taken before him, the court could have entered any judg-

ment thereon it deemed best and proper. Instead of adopting the referee's findings, it could have ignored them and entered up such judgment as it thought best. The court did not resign its judicial functions in the case when it appointed the referee. It could not divest itself of its official duties in that way. This would have been plain without the enactments I have quoted But these statutes fix the matter for the courts of New Mexico.

The referee's report, and the whole of it, was then part of the record, and went properly to the Supreme Court on the appeal. As we have seen, the want of a citation and the omission of a formal order allowing the appeal were not requisite in this case. The appeal was perfected when the bond was approved, and if any irregularities existed in regard to it they were entirely cured by the appearance of the appellee in the appellate court. (Sage *v.* R.R. Co., *supra;* U. S. *v.* Yates, 47 U. S. 608, L. ed. 12–576.) In this case Chief Justice Taney, delivering the opinion of the court, said: "The citation is merely notice to the party, and his appearance, in person or by attorney, is an admission of notice on the record and he cannot afterwards withdraw it." In Carroll *v.* Dorsey, 61 U. S. 204, L. ed. 15–803, Chief Justice Taney repeats this doctrine. Also see Chi. & Pac. R.R. Co. *v.* Blair, 100 U. S. 661, L. ed. 25–587.

There is no question but the appellee appeared in the Supreme Court of the Territory. He there made a motion that the Supreme Court affirm the judgment rendered by the district court, assigning several grounds for such motion, all of which concede that there is a record in that court in the case, but simply contending that the record is not properly made up, inasmuch as it contains the *evidence* taken before the referee.

Then, upon the question of the case being properly in the Supreme Court of the Territory upon appeal, we have

these three points apparent in the record: 1st. An appeal was prayed in open court at the time the judgment was rendered. 2d. An appeal bond was duly approved by the judge. 3d. The appellee appeared in the appellate court.

And as to whether the appeal was so perfected that the Supreme Court should have made the findings required by the act of April 7, 1874 (18 Stat. 27), we recur to the Code of New Mexico, cited above, and show that the whole record was there, and properly there, including the testimony taken before the referee. First, such testimony was part of his report, and hence a part of the judgment roll or judgment record. Second, the law, under which the case was tried, distinctly made "the testimony taken by a referee * * * a part of the record for the purpose of having the cause reviewed by the Supreme Court of the Territory upon appeal or writ of error." The act further declaring that in such event "it shall not be necessary to prepare or have settled, signed, or sealed any bill of exceptions in order to make any such matters a part of the record in such action."

Therefore, how can it be said that the appeal carried before the Supreme Court the pleadings, orders, judgment, etc., just those things that went to make up the judgment roll at common law, and did not take up the testimony taken before the referee. It is clearly the opinion of the Supreme Court that such testimony was not before it, and upon this theory it refused to find the facts.

This theory of the court below, I deduce from its language in refusing to make findings. The Chief Justice says they are unable to find the facts, "the appeal not having been perfected in such manner as to bring the facts of the case into this court."

Counsel for the appellee in his motion to dismiss the case out of this court, seems to construe the action of the Supreme

Court in refusing to make findings exactly as I have; that is, he alleges in substance, the court knew, as a matter of fact, that what was before it purporting to be the record of the case in the district court, embraced the testimony taken before the referee; but held that, as a question of law, it was not there.

If, then, we have shown that the record before the Supreme Court properly embraced *all* the proceedings before the referee and the district court, including the testimony taken, the objections of the defendant (below) to the admission of certain portions of the plaintiff's proofs, and the exceptions to the rulings by the referee, the court was clearly in error in refusing our motion to find the facts.

The Writ of Error.

The case was before the Supreme Court on a writ of error as well as upon appeal. The *præcipe* is found on page 116 of the record. The clerk of the district court is asked to transcribe for use on the appeal to the Supreme Court, among other things, the referee's report, including the testimony taken before him.

It is true the district judge refused to settle and sign a bill of exceptions presented to him (Rec. 117), which bill embraced the testimony taken before the referee with the objections, rulings and exceptions duly noted therein. The court assigned no reasons for this ruling. Yet, regardless of the court's refusal, the transcript was made as requested by the *præcipe*, and the whole record, including the testimony sent to the appellate court.

We were warranted by the statute of the Territory in taking this course. By the terms of an act of the legislature of New Mexico, approved March 16, 1899, it was provided: "In all actions tried without a jury, the testimony

taken before a court, or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, * * * shall become and be a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal *or writ of error, without any bill of exceptions settled, signed or sealed, in order to make any such matters a part of the record in cases so tried.*"

The reason for this law was possibly to meet just such cases as this, where the judge, without giving reasons, should refuse to settle a bill of exceptions. In any event, the law was made for the protection of parties desiring to have their cases reviewed by the Supreme Court.

The case was docketed in the Supreme Court as two cases, the one on appeal and the other on error, and was given two separate numbers. And I shall be able to show that the Supreme Court dealt with the case on appeal for one purpose and the case on error for another.

But my present purpose, in this connection, is to show that the *whole record*, as provided by statute, was before the court both on the appeal and on the writ of error, thus emphasizing our contention that the court was wholly unwarranted in refusing to find the facts.

II.

In our fourth assignment we charge that the court erred in affirming the judgment of the district court on the sole ground that no motion had been made in the latter court for a new trial.

The rules governing the district courts, and those governing the Supreme Court of the Territory, so far as I have been able to ascertain, did not require the appellant to make such a motion.

In a volume of rules found in the U. S. Supreme Court library, which bears the imprint of 1880, I find, among the rules made to govern the district courts, rule 24, which provides that the party proposing to appeal, or take up on error, must submit his bill of exceptions within ten days after the judgment is rendered "*if the appellant desires to present exceptions not appearing in the record.*"

This rule 24 is the only one among all the court rules of the Territory which touches upon the subject of appeals, and no provisions anywhere for motions for new trials.

But the laws of the Territory make specific provisions on this point. Sub-section 133 of Section 2685 of the Code of Civil Procedure reads:

Sub-sec. 133. All motions for new trials, *in cases tried by juries*, shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings.

An act of the Territorial Legislature, approved March 16, 1899, provided, among other things, that "it shall not be necessary to make a motion for a new trial in any case tried by the court without a jury, nor shall it be necessary to incorporate a motion for a new trial in a bill of exceptions in any case, but the same shall become a part of the (record) without doing so."

This act of 1899 was passed and in force before the case was taken into the Supreme Court on the appeal or the writ of error. In fact it was six months after its approval before the writ of error was sued out. I find nothing in its terms that confines its application to suits thereafter to be brought. It appears to us that the court was bound by it, and the decision confirming the judgment of the district court on the ground that no motion had been made for a new trial, was in violation of this law.

But whatever contention might be made as to this, there

can be no question as to the construction that should have been given to Sub-section 133, especially in the absence of any rule. In that section the legislature had taken up the subject of motions for new trials. It fixed limits on such motions in cases "tried by juries." This left all other questions relating to motions for new trials to the ordinary or common law rules of practice. Then, without a written rule of the court governing the matter, the defendant in the original suit had the option to ask for a new trial, or to take the case, after judgment, directly to the Supreme Court.

But, in addition to this, we urge that the motion made by the defendant in the trial court to set aside the report of the referee and again refer the cause with instructions (Rec. 111), was the legal equivalent of a motion for a new trial. In fact, it was the only motion in the nature of a motion for a new trial that could be made. In Hartley *v.* Chidester, 36 Kan., 363, the defeated party filed a motion "to set aside and vacate the verdict of the jury," on the ground that the verdict was not sustained by sufficient evidence, was contrary to law, &c., and the Supreme Court of that State treated and held the motion as one for a new trial.

But counsel for the appellee here, in his brief on motion to dismiss, alleges that the Supreme Court of New Mexico holds that "where a jury is waived and the cause is tried by the court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate court, must move for a new trial below, and, if refused, embody the evidence in a bill of exceptions." This quotation he takes from the syllabus of the case of Sierra Co. *v.* Dona Ana Co., 5 N. M. 191. But an examination of that case shows the syllabus to be a considerable of an enlargement of the text. While the court decided, in effect, what is quoted, it did so without elaboration, and based its decision on Spiegleberg *v.*

Mink, 1 N. M. 308. In fact, the latter was the first case which passed upon this point, all the other cases cited by counsel simply adopting, without argument, what was supposed to be the decision in the latter case.

Now, turning to this first case on which all the other decisions on this point are based, we find that the court alleges that it was a "matter of practice," if a case was tried *before a jury* in order to secure an appeal the aggrieved party should move for a new trial. From this the court deduces the position that where a jury trial is waived and the court is substituted for the jury, the same practice should prevail. The "matter of practice" mentioned by the court may have grown up by reason of some construction placed on sub-section 133, *supra*, where the legislature dealt with the question of motions for new trials "in cases tried by juries." But even such "matter of practice," based on this sub-section, was not very well bottomed. And, in any event, the practice, whatever it was, was confined to cases tried by juries. And the court enlarged the practice by making it applicable to cases where the jury had been waived and the court substituted.

In the case at bar there was no waiver of jury and no substitution of the court. The case was sent to the referee, under the law providing for such reference, on motion of the defendant and in the declared opposition of the plaintiff. Now, if it is contended that the referee was a substitute for the jury, and that the rule in Spiegleberg *v.* Mink should be applied, then certainly the motion made to set aside the report, "and that the said cause be again referred with proper instructions to the referee," which motion was denied, is a complete and ample substitute for a motion for a new trial.

But if the decision in Spiegleberg *v.* Mink fixed a rule requiring that a motion for new trial must be made in *all*

cases tried in the district courts before an appeal can be taken, it must be said that such rule was wholly abrogated and voided by the statute of 1899, quoted above.

In Conclusion.

The declaration of the lower court, that an application had been made to it to find the facts, and that it could not do so because the appeal was not perfected in such manner as to bring the facts of the case into that court, was in itself a *finding* which this court will consider, and upon which it will remand the case if the record shows that the facts of the case *were properly in that court.* In Little Miami, etc., R.R. Co. *v.* The United States, 108 U. S. 277, L. ed. 27–724, it was held, in substance, that where the findings were not sufficiently specific this court might remand the cause for further inquiry and such further proceedings as the justice of the case might require, citing section 701 of the Revised Statutes, which is applicable to the supreme courts of the various Territories.

This court will also take notice of the decision of the court below. That does not have to be set out in the findings. If the decision is clearly erroneous this court will reverse it, even if there be no findings in the record.

The appellant has never had her day in the appellate court. She is entitled to this. She did what she could to have the case reviewed. We ask the protection of this court.